STATE OF MICHIGAN

COURT OF APPEALS

MARIANNE GRISTY, Plaintiff-Appellant,	UNPUBLISHED April 13, 2006
v	No. 267004 Oakland Circuit Court
VIC'S WORLD CLASS MARKET and VICTOR J. VENTIMIGLIA, JR., Defendants-Appellees.	LC No. 2005-064622-NI

Before: Smolenski, P.J., and Saad and Owens, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition under MCR 2.116(C)(10). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Upon de novo review, we find no error in the trial court's decision granting defendants' motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). The trial court relied on the open and obvious doctrine to grant summary disposition. Under that doctrine, a premises possessor generally is not required to protect an invitee from an open and obvious danger, unless special aspects of the condition create an unreasonable risk of harm. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001).

> The test to determine if a danger is open and obvious is whether "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). Because the test is objective, this Court "looks not to whether plaintiff should have known that the [condition] was hazardous, but to whether a reasonable person in his position would foresee the danger." *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997). [*Joyce v Rubin*, 249 Mich App 231, 238-239; 642 NW2d 360 (2002).]

Viewing the evidence in a light most favorable to plaintiff, we are satisfied that plaintiff failed to raise a genuine issue of material fact regarding whether an average user of ordinary

intelligence, upon casual inspection of the cement area located at the base of the pole, would have discovered the metal plate and the risk it presented. *Id.* at 238. The material issue is not whether contrasting color could have alerted a reasonable person to the danger, but whether there was an open and obvious danger. *Id.*; see also *Bertrand v Alan Ford, Inc*, 449 Mich 606, 618-621; 537 NW2d 185 (1995).

Plaintiff acknowledged in her deposition that she did not look down as she walked behind the pole. The pole itself, as depicted in the color photocopies of photographs submitted to the trial court by plaintiff, would have alerted a reasonable person to a potential danger. The adjacent bolt heads would have alerted a reasonable person to something being secured next to the pole. The metal plate itself, while slim, is clear and obvious. We find nothing in the coloration of the area depicted in the color photocopies or plaintiff's description of the area as "blended in," "all one color," and "like a camouflage" in deposition testimony, that raised a genuine of issue of material fact regarding whether the condition was open and obvious.

We also reject plaintiff's claim that she established special aspects of the condition to remove it from the open and obvious doctrine. *Lugo, supra* at 519. Plaintiff's reliance on *McKim v Forward Lodging, Inc,* 266 Mich App 373; 702 NW2d 181 (2005), is misplaced in light of our Supreme Court's summary reversal of that decision at 474 Mich 947 (2005). Further, plaintiff's deposition testimony does not support a reasonable inference that she was effectively forced to walk behind the pole and encounter the condition. *Joyce, supra* at 242-243. To the contrary, the evidence indicated that the pole was intended to separate incoming and departing customers. Plaintiff's deposition testimony, viewed in a light most favorable to herself, indicated only that she chose to walk behind the pole toward the pathway intended for incoming customers, rather than walk straight out, alongside the pole. To avoid summary disposition, it was incumbent on plaintiff to set forth specific facts showing a genuine issue for trial. *Maiden, supra* at 121. Because plaintiff did not do so, the trial court properly granted defendants' motion for summary disposition.

Affirmed.

/s/ Henry William Saad
/s/ Donald S. Owens